

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

NOV 05 2007

PENNY BROCK,

Plaintiff - Appellant,

v.

LIFE INSURANCE COMPANY OF  
NORTH AMERICA,

Defendant - Appellee.

No. 05-16965

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

D.C. No. CV-04-0644-HDM

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Howard D. McKibben, District Judge, Presiding

Submitted October 19, 2007<sup>\*\*</sup>  
San Francisco, California

Before: ROTH<sup>\*\*\*</sup>, THOMAS and CALLAHAN, Circuit Judges

Penny Brock appeals the denial of her motion for summary judgment and

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

<sup>\*\*\*</sup> The Honorable Jane R. Roth, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

the grant of summary judgment in favor of Life Insurance Company of North America (LINA). At issue in this case is a cancer insurance policy purchased by her late husband, William Brock. The insurance policy provided the insured with an option to purchase a survivor benefit that would pay his surviving spouse \$1000 in the event that he died from a covered cancer. William Brock chose not to exercise this option. Brock now seeks \$500,000 in survivor benefits based on the death of her husband from a covered cancer. For the reasons given below, we affirm the decision of the district court.

### **Procedural History**

Brock filed suit against LINA for wrongful denial of benefits. Brock moved for summary judgment on December 28, 2004. LINA cross-moved for summary judgment on March 11, 2005. The district court entered final judgment in favor of LINA on August 10, 2005. Following the entry of final judgment, Brock filed a notice of appeal on September 1, 2005. The notice was timely pursuant to Fed. R. App. P. 4(a). The district court had jurisdiction pursuant to 28 U.S.C. § 1332, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

### **Discussion**

Grants of summary judgment are reviewed de novo. Nat'l Wildlife Fed'n v. United States Army Corps of Eng'rs, 384 F.3d 1163, 1170 (9th Cir. 2004). On

appeal, this Court must determine whether, viewing the evidence in the light most favorable to Brock, there are any genuine issues of material fact and whether the District Court correctly applied the relevant substantive law. United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1144 (9th Cir. 2004).

Brock argues on appeal (1) that the district court erred in applying District of Columbia law in interpreting the insurance policy; (2) that the certificate summarizing Mr. Brock's insurance coverage is the controlling document, not the policy; and (3) that the certificate provides \$500,000 in survivor/death benefits. We need not reach the first two questions, as we find that the certificate simply does not provide the coverage Brock seeks. Even if we were to adopt the view that LINA is estopped from denying any coverage provided by the certificate, Brock cannot prevail.

The certificate lists the schedule of benefits to which Brock is entitled on its second page. Survivor benefits are not on this list. It then describes the benefits available under the policy in a separate "Description of Benefits" section. In addition to the survivor benefits, it lists five other benefits that do not appear on the schedule of benefits (the Nurse at Home Benefit, Hospice Care Benefit, First Diagnosis Benefit, Outpatient Cancer Screening Benefit, and Skilled Nursing Facility Confinement Benefit). The only reasonable reading of the schedule of

benefits is that it describes only coverage that William Brock had actually purchased.

Additional support for this reading is provided by the description of the survivor benefits, which states that “the Insurance Company will pay the amount shown in the Schedule of Benefits” to the surviving spouse. There is no amount shown on the schedule of benefits for survivor benefits. It is not reasonable to do as Brock suggests and simply fill in the largest number that appears on the schedule of benefits as the amount of the survivor benefit.<sup>1</sup>

The certificate can not reasonably be read to establish that William Brock was covered for survivor benefits.<sup>2</sup> Accordingly, we **AFFIRM** the judgment of the district court.

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<sup>1</sup>Brock also argues that a \$500,000 survivor benefit must be implied in order to “give meaning” to the \$500,000 cap on total benefits. The cap on benefits is quite high relative to the amount available under each individual benefits. However, it is not impossible for an insured to reach the cap, and in any event the mere existence of a generous cap does not give this Court license (or create a responsibility) to simply create liability up to the level of the cap.

<sup>2</sup>The certificate also provides that, if questions arise, the policy will govern.